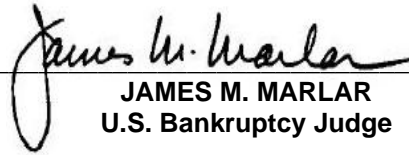


SIGNED.



Dated: October 16, 2008


JAMES M. MARLAR
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:) Chapter 11
FIRST MAGNUS FINANCIAL)
CORPORATION,) No. 4:07-bk-01578-JMM
Debtor.) **MEMORANDUM DECISION**

Before the court is the motion of Dell Marketing, L.P. ("Dell") for administrative expense priority concerning property sold to the Debtor and delivered within the 45-day period preceding the filing of the chapter 11 bankruptcy case on August 21, 2007 (Dkt. #3778).

The facts are that the Debtor ordered, and Dell shipped, products to the Debtor as follows:

- Within 20 days prior to petition date \$94,535.45
(Declaration of Michael Keller)
 - Within 21 and 45 days prior to petition date
(Declaration of Michael Keller) 79,700.62
- \$174,236.07

Dell promptly and timely made a reclamation demand upon the Debtor, through counsel Sabrina Streusand, on September 7, 2007.

The Debtor never returned any of Dell's product, and instead surrendered it to one of its secured creditors, JPMorgan Chase, N.A., which has disposed of said property and credited sums received against its own obligations due from Debtor. The Debtor benefitted from such surrender of products, subject to reclamation, by having the proceeds reduce its obligation to JPMorgan Chase.

1 Ms. Streusand's letter effectively created an informal proof of claim under the law,
2 although the figures set forth in her letter were later adjusted. *See In re Edelman*, 237 B.R. 146,
3 154 (9th Cir. BAP 1999). The total remained constant. Other filings by Dell also put the Debtor
4 on notice of Dell's claims, both substantively and procedurally. Dell's claims were all timely, and
5 the Debtor's efforts to claim other adequate means of notice were ineffective and legally insufficient
6 to bind Dell to any such deadlines claimed by the Debtor.

7 In addition, Dell filed a timely proof of claim, which, among other things, mentioned
8 an administrative claim under § 503(b)(9).

9
10 LAW

11
12 **A. Product sold to Debtor within 20 days pre-petition**

13
14 Dell is entitled to an administrative expense claim of \$94,535.45, pursuant to
15 11 U.S.C. § 503(b)(9). The Debtor failed to rebut, by affidavit or argument, the *prima facie* case
16 made by Dell in its moving papers. FED. R. BANKR. P. 3001(f). Dell's request for administrative
17 expense status for \$94,535.45 will be GRANTED.

18
19 **B. Product sold to Debtor between 21 and 45 days pre-petition**

20
21 Section 546(c) gives a seller of goods the right to seek reclamation of goods sold to
22 a debtor in the ordinary course of the seller's business and received by the insolvent debtor within
23 45-days pre-petition. But while Dell had that right, the Debtor did not comply with the demand, and
24 instead turned the goods over to another competing creditor, JPMorgan Chase. Section 546(c) is
25 not a creditor remedy statute, but instead describes limitations on a trustee's (or debtor-in-
26 possession's) avoiding powers under § 544 (strongarm), § 545 (statutory liens), § 547 (preferences)

1 and § 549 (post-petition transfers). *See, e.g., In re Dana Corp.*, 367 B.R. 409, 413-14 (Bankr. S.D.
2 N.Y. 2007). In other words, a trustee is subject to a seller's reclamation rights, and thus has to return
3 the product if the reclamation is timely asserted by the selling creditor.

4 But § 546(c) does not address what happens if a creditor's demand for reclamation is
5 ignored, or if the reclamation seller does not promptly seek assistance from the court, and thereby
6 forces the debtor to give back the sold product. The statute does not give such a seller/creditor an
7 administrative claim, except to the extent it qualifies for one under § 503(b)(9). 11 U.S.C.
8 § 546(c)(2). If its product is thereafter lost to a senior secured lender, as in this case, by "selling
9 into" the blanket lien of a perfected senior lienholder, or if the Debtor simply ignores the demand,
10 the creditor may lose its rights, as here.

11 What then, is the creditor left with? The answer is: Only an unsecured claim (or a
12 claim against the secured lender for conversion), unless it can establish a benefit to the estate to
13 qualify as an administrative expense under § 503(b)(1). *See, e.g., In re Pittsburgh-Canfield Corp.*,
14 309 B.R. 277, 286 (6th Cir. BAP 2004) (reclaiming seller is entitled to a lien or administrative
15 expense to the full extent of the seller's valid reclamation claim under state law); VERNON'S TEX.
16 BUS. & COM. CODE ANN. § 2.702(c) (Thompson Reuters/West 2008) (seller's right to reclaim is
17 subject to rights of a lien creditor).

18 Here no such benefit has been established by Dell, sufficient to qualify as an
19 administrative expense for the product shipped between 21 and 45 days, pre-petition, and no
20 evidence was presented which would support such a claim. *See In re Abercrombie*, 139 F.3d 755,
21 757 (9th Cir. 1998) (administrative expense claim must arise from postpetition transaction and
22 directly and substantially benefit the estate).

23 Accordingly, Dell's request for administrative expense status of \$79,700.62 will be
24 DENIED. Its claim for this amount is unsecured.

25 A separate order will be entered.

26
27 DATED AND SIGNED ABOVE.

COPIES served upon the following in the manner indicated on the date signed above:

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